Land and Environment Court

New South Wales

Amendment notes

Medium Neutral Citation:	**Rafailidis v Roads and Maritime Services (No 2) [2014] NSWLEC 9**
Hearing dates:	3, 4, 5 February 2014
Decision date:	11 February 2014
Jurisdiction:	Class 3
Before:	Craig J
Decision:	1. Dismiss the applicants' challenge to the validity of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)*. 2. In accordance with the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* determine compensation payable by the respondent for acquisition on 16 November 2012 of Lot 2 in Deposited Plan 1170535 in the sum of $153,820. 3. Exhibits other than Exhibit 1A may be returned.
Catchwords:	COMPULSORY ACQUISITION - determination of compensation for compulsory acquisition of land - land compulsorily acquired for the purpose of upgrading and widening a road - whether Roads and Maritime Services is an authority of the State for the purposes of the Lands Acquisition Act 1989 (Cth) - validity of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) - what is just compensation - determination of market value - whether decrease in value of land at date of acquisition by reason of the roadworks - injurious affection - costs which qualify as 'loss attributable to disturbance'
Legislation Cited:	Camden Local Environmental Plan 2010 Commonwealth Constitution Constitution Act 1902 (NSW) Judiciary Act 1903 (Cth) Land Acquisition (Just Terms Compensation) Act 1991 (NSW)

	Land and Environment Court Act 1979 (NSW) Lands Acquisition Act 1989 (Cth) Roads Act 1993 (NSW) State Environmental Planning Policy (Sydney Region Growth Centres) 2006 Transport Administration Act 1988 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Armidale Dumaresq Council v Vorhauer [2012] NSWLEC 154 Arnold v Minister Administering the Water Management Act 2000 [2008] NSWCA 338; 73 NSWLR 196 Durham Holdings Pty Ltd v The State of New South Wales [2001] HCA 7; 205 CLR 399 Johnston Fear & Kingham & Offset Printing Company Pty Ltd v The Commonwealth [1943] HCA 18; 67 CLR 314 Leichhardt Council v Roads and Traffic Authority (NSW) [2006] NSWCA 353; 149 LGERA 439 Minister for Minerals and Energy v Vaughan-Taylor (1991) 73 LGRA 115 Mir Bros Unit Constructions Pty Ltd v Roads and Traffic Authority of NSW [2005] NSWLEC 467 National Parks and Wildlife Service v Stables Perisher Pty Ltd (1990) 20 NSWLR 573 Rafailidis v Roads and Maritime Services [2013] NSWLEC 131 R v MSK and MAK [2004] NSWCCA 308; 61 NSWLR 204 The Queen v Phillips [1970] HCA 50; 125 CLR 93 Trade Practices Commission v Tooth & Co Ltd [1979] HCA 47; 142 CLR 397
Category:	Principal judgment
Parties:	Koula Rafailidis (First applicant) Efrem Rafailidis (Second applicant) Roads and Maritime Services (First Respondent) Attorney General for New South Wales (Intervenor)
Representation:	COUNSEL Self represented (Applicants) N Eastman (First Respondent) B K Baker (solicitor) (Intervenor) SOLICITORS

	Self represented (Applicants) Clayton Utz (First Respondent) I V Knight, Crown Solicitor (Intervenor)
File Number(s):	30195 of 2013

JUDGMENT

1 Koula and Efrem Rafailidis (**the applicants**) are the joint registered proprietors of land known as 955 Camden Valley Way, Catherine Field. That land comprises a small rural holding in south-western Sydney. Erected on the land are two dwellings. One comprises a modest single storey fibro dwelling with an iron roof. The second dwelling is more substantial, being described as a two storey "project-style home", the erection of which is said to have been completed in 2009.

2 The land is a corner allotment having frontage to both Camden Valley Way and Deepfields Road. Camden Valley Way is a major traffic thoroughfare carrying significant volumes of traffic. The two dwellings to which I have referred were set back some distance from the Camden Valley Way frontage. The more substantial newer dwelling has a setback of approximately 150m from that road frontage.

3 By notice published in the New South Wales *Government Gazette* on 16 November 2012, a strip of land approximately 30m in width at the Camden Valley Way frontage of the land was compulsorily acquired by Roads and Maritime Services (**RMS**) under the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Compensation Act**). The acquisition was expressed to be "for the purposes of the *Roads Act 1993* (NSW)*".* It is not in contest that the specific purpose of the acquisition was for the upgrading and widening of Camden Valley Way over a distance of about 10.6km.

4 On 15 March 2013, the applicants commenced proceedings in this Court pursuant to s 66 of the Compensation Act, objecting to the offer of compensation made to them by RMS. Those proceedings are now before the Court for determination.

THE ISSUES

5 The compensation determined by the Valuer-General pursuant to s 42 of the Compensation Act as being payable to the applicants was $96,500. RMS does not contend for that figure. It submits that compensation should be

determined in the sum of $126,000 together with such sum for reasonable legal and valuation fees as have been incurred by the applicants in connection with the acquisition of their land: ss 55(d) and 59 of the Compensation Act.

6 The quantum of compensation sought by the applicants is unclear. From the commencement of the proceedings they have been represented by Mrs Rafailidis who is not a legal practitioner. The Class 3 Application commencing the proceedings, prepared by Mrs Rafailidis, sought an order that compensation be determined in the sum of $214,500 "with the right to review (following completion of valuation expert witness evidence)". However, despite directions made for the applicants to serve any valuation evidence upon which they sought to rely they have neither filed nor served any such evidence. Orders requiring the preparation and service of expert evidence were the subject of directions made both on 9 August and again on 11 October 2013. A copy of the directions made on 11 October by Biscoe J was made available to Mrs Rafailidis in writing. The reluctance of the applicants to accept any directions for the preparation of evidence and otherwise to participate in the Court's usual pre-trial procedures is recorded in an earlier judgment (*Rafailidis v Roads and Maritime Services* [2013] NSWLEC 131).

7 When, at the outset of the present hearing, I enquired of Mrs Rafailidis as to the quantum of compensation sought, she declined to nominate any sum, contending that the process of compulsory acquisition of land was unlawful. She stated that she did not intend to tender or call any evidence in support of the claim identified in the Class 3 Application, with the consequence that the only evidence before me is that tendered on behalf of RMS. However, as will later appear, at the conclusion of her final submissions Mrs Rafailidis nominated the sum of $550,000 as being acceptable to resolve her claim.

8 Notwithstanding the position taken by the applicants, I must heed the injunction contained in s 66(2) of the Compensation Act which requires that, objection having been lodged under subs (1), the Court "is to hear and dispose of the person's claim for compensation." When this requirement is considered in conjunction with the provisions of ss 3(1)(a) and 10(1) of that Act, guaranteeing that compensation "will not be less than market value (assessed under [the] Act) unaffected by the proposal" for land that is acquired under the Act, I am required to consider the evidence that is before me in order to determine that the applicants are "justly" compensated for the acquisition of part of their land by RMS. The provisions of s 54(1) of the Compensation Act require as much, the proceedings not having been discontinued.

9 There is a further and preliminary issue that must be considered. On 8 August 2013, Mrs Rafailidis gave Notice under s 78B of the *Judiciary Act 1903* (Cth) of a Constitutional matter arising in the proceedings. That "matter" was described in the Notice as follows:

> "Section 51 of the *Commonwealth of Australia Constitution Act 1900* provides: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to -
>
> (xxxi) The acquisition of property on just terms from any State or Person for any purpose in respect of which the Parliament has power to make laws:".

10 The narrative in the Notice that follows identification of the Constitutional matter contends, in summary, that the Compensation Act is an Act made beyond power, having regard to the provisions of s 51(xxxi) of the Constitution.

11 The Notice was addressed to the Attorney's-General of the Commonwealth and all States. Only the Attorney for New South Wales has sought to intervene in the proceedings in response to the Notice.

12 From this narrative, it will be apparent that the issues to be determined, expressed at a level of generality, are:

(i) whether the Compensation Act authorising the compulsory acquisition of land is a valid enactment by the New South Wales Parliament; and

(ii) if that Act is validly enacted, what is the just compensation to be paid to the applicants conformably with the provisions of that Act as a consequence of the compulsory acquisition of their land on 16 November 2012.

I propose to consider the issues in that order. No further elaboration of background facts is necessary to address the first issue.

THE CONSTITUTIONAL ISSUE

The statutory provisions pertaining to compulsory acquisition

13 Section 5 of the Compensation Act provides that the Act applies to the acquisition of land "by an authority of the State which is authorised to acquire the land by compulsory process": subs (1). An "authority of the State" is defined in s 4(1) to include any authority authorised to acquire land by compulsory process.

14 RMS is constituted as a corporation by s 46(1) of the *Transport Administration Act 1988* (NSW). By s 46(2) of that same Act, RMS is "a NSW Government agency".

15 RMS is authorised by s 177(1) of the *Roads Act*, to acquire land for the purposes

of that Act. Section 178(1) of the *Roads Act* enables RMS to acquire land by agreement or "by compulsory process" in accordance with the provisions of the Compensation Act. It follows that it is an "authority of the State" to which the provisions of the Compensation Act apply.

16 The process for acquisition of land by compulsory process is found in Pt 2 of the Compensation Act. By s 19 of that Act, RMS as an authority of the State, is entitled, with the approval of the Governor, to declare by notice published in the Gazette that land described in that notice is acquired by compulsory process. In the present case, the Notice published in *Government Gazette* No 121 on 16 November 2012 gave effect to that provision in respect of the land of the applicants along with other lands in proximity to it. Upon publication in the Gazette, the land described in that Notice was vested in RMS: s 20. Once the land vested in RMS, the right of the applicants was to be paid compensation by reason of its acquisition: s 37.

The contentions of Mrs Rafailidis

17 Unfortunately, no written outline of submissions directed to this issue was provided by Mrs Rafailidis. As I understood her submission, based upon material recorded in her Notice under s 78B of the *Judiciary Act*, it was to the following effect.

> (1) Section 5 of the *Constitution Act 1902 (NSW)* enables the State legislature to make laws for the "peace, welfare, and good government" of the State. However, that power is expressed to be subject to the provisions of the Constitution.
>
> (2) Section 51(xxxi) of the Constitution provides for acquisition of property on just terms: it does not authorise the compulsory acquisition of property.
>
> (3) Use of the word "terms" in the expression "just terms" identifies an element of contract, that is, the need for agreement.
>
> (4) No contract has been reached between the applicants and RMS for acquisition by the latter of the land in question.
>
> (5) Acquisition of property against will is not contractual in nature and involves the absence of consent on the part of the party from whom the property is acquired. That circumstance implies slavery (sic). No legislative enactment authorises slavery and it cannot lawfully sustain the acquisition of property against will. To the extent that the Compensation Act purports to do so, it is beyond power, being unauthorised by s 51(xxxi) of the Constitution.

18 Although not directly relevant to the Constitutional issue notified by Mrs Rafailidis, she also submitted that no man-made law could authorise the taking of property without the consent of the owner of that property as that action would constitute "stealing". The stealing of property is contrary to the Biblical commandment "thou shalt not steal" and that commandment applies to all.

19 That submission cannot be sustained. In applying the rule of law, it is the law laid down by the valid enactments of Parliament that I must apply when determining the present proceedings.

20 Although not developed by submissions, on a number of occasions throughout the hearing, Mrs Rafailidis asserted that her proceedings were required to be tried by jury. The legal basis for such a contention was not identified. I am not aware of any law that would require any proceedings in this Court to be tried by jury or any law affording an applicant the right to elect that mode of trial in proceedings of the present kind. This contention by Mrs Rafailidis must be rejected.

The Compensation Act is a valid enactment of the New South Wales Parliament

21 As was accepted by the Attorney-General, in determining the present proceedings, this Court has power to consider and determine the Constitutional issue raised by Mrs Rafailidis: s 16(1A) of the *Land and Environment Court Act 1979* (NSW) and s 39 of the *Judiciary Act*. Judicial authority for the exercise of power to determine matters ancillary to the exercise of the Court's statutory jurisdiction may be found in *National Parks and Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573 at 582 and *Minister for Minerals and Energy v Vaughan-Taylor* (1991) 73 LGRA 115 at 123 (Meagher JA). More recent discussion of the principles there referred to as applied to a Constitutional challenge are found in the judgment of Spigelman CJ (Allsop P and Handley AJA agreeing) in *Arnold v Minister Administering the Water Management Act 2000* [2008] NSWCA 338; 73 NSWLR 196 at [75] - [80].

22 The first step in the argument advanced by Mrs Rafailidis, founded upon s 5 of the *Constitution Act*, suggests that the Compensation Act is not a law for "the peace, welfare and good government" of this State. The submission appears to be premised upon the claim that a law allowing compulsory acquisition of land is antithetical to the purpose of a law having the attributes described in s 5. I do not accept that premise. It is not readily apparent why instrumentalities of the State or statutory bodies acting in the public interest and in conformity with the legislation by which they are constituted, should

not have a power of compulsory acquisition in order to achieve a statutory purpose.

23 Importantly, judicial consideration of s 5 of the *Constitution Act* speaks against use of the section in the manner invoked by Mrs Rafailidis. In *R v MSK and MAK* [2004] NSWCCA 308; 61 NSWLR 204 Mason P (Wood CJ at CL and Barr J agreeing) said at [37]:

> "The plenary power conferred upon the Legislature by s 5 of the *Constitution Act* 1902 and confirmed by s 2 of the *Australia Act* 1986 (Cth) means that it is for Parliament, and not the courts, to determine the wisdom and extent of legislative measures that modify or abrogate common law rights. A court cannot strike down legislation on the ground that, in the opinion of the court, the legislation does not promote or secure the peace, order or good government of the State [citation authority omitted]."

24 I do not accept that s 51(xxxi) of the Constitution bears upon the validity of the Compensation Act in the manner submitted by Mrs Rafailidis. Reference to "the Parliament" in the Constitution is a reference to the Commonwealth Parliament: s 1. Section 51 identifies those matters upon which the Commonwealth Parliament may exercise legislative power. Paragraph (xxxi) of the section is directed to acquisition of property for a purpose in respect of which the Commonwealth Parliament has power to make laws: it is not a provision that controls the capacity of the New South Wales Parliament to pass laws for the compulsory acquisition of property by an entity of the State nor does it control the means by which compensation, if any, is to be determined in the event of acquisition under State legislation.

25 Moreover, and contrary to the submission of Mrs Rafailidis, there is no inference to be drawn from the provisions of s 51(xxxi) of the Constitution that acquisition by compulsory process is proscribed. The head of legislative power expressed in par (xxxi) requires only that any property acquired in exercise of Commonwealth power by an entity of the Commonwealth provide "just terms" to the dispossessed owner for that property. The subsection is silent as to the means by which acquisition of property may be achieved.

26 The Commonwealth legislation that is equivalent to the Compensation Act is the *Lands Acquisition Act 1989* (Cth). By s 16 of the latter Act, a Commonwealth authority is authorised to acquire land by compulsory process. Part 7 of that Act then mandates the payment of compensation for that acquisition thereby giving effect to the provisions of s 51(xxxi) of the Constitution. According to my researches, no successful challenge to the power of acquisition by compulsory process under the *Lands Acquisition Act* has been sustained by any court.

27 Importantly, the challenge mounted by Mrs Rafailidis is answered by the decision of the High Court in *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7; 205 CLR 399. One of the arguments advanced in

that appeal was that New South Wales legislation was invalid as the Parliament lacked power to legislate having the effect of depriving a person of property without just compensation. That argument was rejected. At [7] the plurality (Gaudron, McHugh, Gummow and Hayne JJ) said:

> "The applicant also contends in this Court that the legislation in question is invalid because the Parliament of New South Wales lacks power to enact laws for the acquisition of property without compensation. There are numerous statements in this Court which deny that proposition."

28 In a separate judgment delivered in that case, observations to similar effect were made by Kirby J where his Honour said at [56]:

> "Thirdly, so far as the powers of a Parliament of a State of Australia to permit the acquisition of property without the payment of compensation are concerned, a long line of opinions in this Court upholds the existence of that power [citation of authority omitted] ....
>
> These decisions equate the power of a Parliament of a State to the uncontrolled legislative authority enjoyed by the Parliament of the United Kingdom in its own sphere [citation omitted]. Whereas in the federal Constitution, specific provision has been made requiring the provisions of "just terms" as a precondition to the acquisition of property from any State or person by federal law [citation omitted], no equivalent provision was there included in respect of State acquisition laws."

29 In the course of her final submissions Mrs Rafailidis made reference to the judgments of Latham CJ and Starke J in *Johnston Fear & Kingham & Offset Printing Company Pty Ltd v The Commonwealth* [1943] HCA 18; 67 CLR 314 at 323 and 326 where their Honours made observations as to the Constitutional requirements of "just terms" articulated in s 51(xxxi) of the Constitution. In the same context, Mrs Rafailidis also made reference to the judgment of Barwick CJ in *Trade Practices Commission v Tooth & Co Ltd* [1979] HCA 47; 142 CLR 397 at 403 where the Chief Justice identified the purpose of s 51(xxxi) of the Constitution. His Honour concluded the passage cited by Mrs Rafailidis by saying of s 51(xxxi):

> "It ensures that no one may*, by virtue of a Commonwealth statutory provision*, acquire his property except upon just terms." [Emphasis added.]

30 The passages cited by Mrs Rafailidis from the judgments of the High Court provide no support for her contention of invalidity. Each of those cases addresses acquisition of property said to have been founded upon a Commonwealth statutory provision or regulation. The sentence just quoted from the judgment of Barwick CJ demonstrates the provisions of s 51(xxxi) to be so confined. Acquisition of part of the applicants' property by RMS involves neither acquisition by a Commonwealth entity nor acquisition under Commonwealth legislation.

31 Sections 106, 107 and 108 of the Constitution specifically save the respective constitutions of the States, the powers of State Parliaments and also State laws (*Armidale Dumaresq Council v Vorhauer* [2012] NSWLEC 154 at [29]). As Windeyer J stated in *The Queen v Phillips* [1970] HCA 50; 125 CLR 93 at 116, those three sections of the Constitution:

> " ... together state the result of the distribution of legislative powers, exclusive and concurrent, between the Commonwealth and the States. Section 107 preserves the legislative competence of State Parliaments in respect of any topic that is not exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State. This is simply an expression of an element that is implicit in any federal system in which defined powers are granted to the central authority and the undefined residue remains with the constituent provinces. Section 107 confirms that as the underlying principle of Australian federalism."

32 That judgment together with the judgments of the High Court in *Durham Holdings Pty Ltd v The State of New South Wales* make clear that the power of the New South Wales Parliament to legislate for the acquisition of property by instrumentalities of this State for a State legislative purpose, however that acquisition may be achieved, and however compensation (if any) for such acquisition is determined, is a power untrammelled by the provisions of s 51(xxxi) of the Constitution. For this reason, the submission by Mrs Rafailidis cannot succeed. There is no sustainable submission advanced by her that casts doubt upon the validity of the Compensation Act.

DETERMINATION OF COMPENSATION

33 In order to determine the compensation to which the applicants are entitled following acquisition of their land, it is first necessary to make more detailed reference to the facts and applicable legislative provisions. However, before proceeding to address those matters, it is necessary to notice that in conducting this case on behalf of the applicants, Mrs Rafailidis did not engage with the issue of compensation in any meaningful way.

34 As I have earlier stated, Mrs Rafailidis did not seek to lead any valuation evidence, notwithstanding the opportunity afforded to her to do so. The constant and oft repeated theme of her advocacy was that her property had been stolen from her by RMS; that such action was contrary to the laws of God as reflected in the Bible, with the consequence that she was entitled to have the acquired land reinstated to the ownership of the applicants. She also asserted, on more than one occasion, that this Court was not a lawfully constituted Court, that I was not a duly appointed judge of the Court and that, in any event, the Court lacked power to do other than require reinstatement of the acquired land.

35 A further manifestation of unwillingness to address the issue of compensation is evident from the action of Mrs Rafailidis when, on the second day of hearing, an inspection of the applicants' land and its environs was conducted. The applicants' land together with the acquired land was inspected from the adjoining public roads. The fact that the inspection would be carried out was stated in Court on the first day of hearing. Following this inspection, at which Mrs Rafailidis was present, I indicated to her that an inspection would also be made of those properties identified in the valuation evidence that had been tendered and which were referred to as comparable sales for the purpose of determining the market value of the acquired land. Such an inspection had been foreshadowed on the first day of hearing. Although Mrs Rafailidis was urged to participate in the process of inspection of those properties, then to be undertaken, she declined to do so.

36 Notwithstanding the stance taken by Mrs Rafailidis as to the jurisdiction of the Court and the unlawfulness of the acquisition, in final submissions Mrs Rafailidis did initially state that the sum to which she was entitled as compensation was $374,000 plus a filing fee of $1,000 incurred when she commenced the present proceedings. Later in her final submissions she stated that the sum of $550,000 "was on the table" as an offer to resolve her claim.

37 A significant component of that sum was intended to reflect compensation for the anxiety occasioned to her and to her family by reason of the acquisition of her land. The enjoyment of the parent land had been significantly diminished by the acquisition of the acquired land and the roadworks intended for it. No attempt was made to identify the basis for either amount by reference to the provisions of the Compensation Act. Indeed, Mrs Rafailidis candidly stated that "market value" as defined in that Act was inappropriate to be applied to the present acquisition because of the impact that the land acquisition has had upon her and her family. However, as the decision of the Court of Appeal in *Leichhardt Council v Roads and Traffic Authority (NSW)* [2006] NSWCA 353; 149 LGERA 439 makes clear, the notion of "value to the owner" is not comprehended as a basis of compensation payable under the Compensation Act (Spigelman CJ at [30], Beazley, Bryson and Basten JJA, Campbell J agreeing).

38 Despite the approach taken by Mrs Rafailidis in the conduct of the hearing, for reasons earlier stated, it is appropriate that I proceed to determine compensation payable to the applicants and to do so by reference to the evidence that has been provided in the course of the hearing. As explained to Mrs Rafailidis, that determination must be made by applying the provisions of the Compensation Act. I have no power to do otherwise.

Background: the roadworks and their impact

39 At the date of acquisition, Camden Valley Way in the vicinity of the parent land operated as a two lane road providing for one lane of traffic in each direction. When roadworks are completed by RMS, Camden Valley Way will operate as a four lane divided road with a wide landscaped central median between the two constructed carriageways. Traffic speed will be regulated at 80kph.

40 At the conclusion of those roadworks, the turning movements on Camden Valley Way will be limited to "left in/left out" at the Deepfields Road intersection. Otherwise, there will be a traffic signals controlled intersection to the south of the residue land affording access to Camden Valley Way in either direction at its intersection with Catherine Field Road. The distance from the residue land to that intersection via Deepfields Road and Chisholm Road in order to connect with Catherine Field Road is approximately 4km. The distance separating the residue land from that same intersection assuming travel to be available in either direction along Camden Valley Way is approximately 500m.

41 When the "Catherine Fields" precinct is released for urban development and the consequent rezoning takes place, the intersection of Deepfields Road with Camden Valley Way will be closed. However, it is assumed that when that occurs the residue land will be capable of a higher order land use.

Background: the land and land use controls

42 Prior to acquisition, the land owned by the applicants was described as Lot 10 in Deposited Plan 27602 (**the parent land**). That land is rectangular in shape and is located on the north-western corner of Camden Valley Way and Deepfields Road. The parent land had a frontage of 59.192m to Camden Valley Way with a splayed frontage to the intersection of Deepfields Road of 21.15m. The side boundary along Deepfields Road is 276.66m. Deposited Plan 27602 shows the land to have a total area of 22,260m² or 2.226ha.

43 In anticipation of the acquisition, a plan of subdivision of the parent land was registered as Deposited Plan 1170535. Lot 52 in that Deposited Plan is the land acquired by RMS following publication in the Gazette of the acquisition notice on 16 November 2012 (**the acquired land**). Lot 51 in the Deposited Plan is the land remaining in the ownership of the applicants (**the residue land**).

44 The acquired land is irregular in shape. It has a depth of 30m running generally parallel to the Camden Valley Way frontage of the parent land. It also provides a further splay at the intersection of Camden Valley Way and Deepfields Road with a small triangular section extending beyond the 30 metre depth of the Lot into the parent land, no doubt intended to provide for a large splay at the

Deepfields Road/Camden Valley Way intersection upon completion of proposed roadworks. The acquired land has a total area of 2,127m².

45 As I have earlier recorded, there are two dwellings that were erected on the parent land. Those dwellings are located on the residue land. At the date of acquisition there were no man-made improvements upon the acquired land apart from boundary fencing. A substantial stand of mature trees along the Camden Valley Way frontage provided a significant screen between that road and the dwelling occupied by the Rafailidis family. Roadworks since undertaken have required the removal of those trees, as was always intended, with the consequence that there is no present physical screening between the dwellings and Camden Valley Way. The principal residence on the parent land is said to have been located approximately 150m from the boundary with Camden Valley Way as it was prior to acquisition. That separation has now been reduced by 30m as a consequence of the acquisition.

46 Catherine Field is described as generally being characterised as a rural residential area, typically developed with single or dual occupancy dwellings on lots approximating 2ha in area.

47 The parent land was at the date of acquisition and remains subject to the provisions of State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (**the Growth Centres SEPP**). However, the primary land use controls applying at the date of acquisition were imposed by Camden Local Environmental Plan 2010 (**the LEP**). Under the provisions of the LEP, almost the whole of the parent land is zoned "RU4 Primary Production Small Lots". The remainder of the parent land, being an area approximating but not precisely the same as the acquired land, is zoned "SP2 Infrastructure". The purpose shown on the zoning map for that land is "Classified Road".

48 The valuation evidence before me and which I will later address, states that the SP2 zone was imposed as part of the proposal to acquire the acquired land for the road purposes intended by RMS. It is contended that because the SP2 zoning would decrease the value of the land, that zoning is to be disregarded when determining market value: s 56(1)(a) of the Compensation Act. The determination of market value has therefore been approached on the basis that the acquired land should assume the zoning of the residue land, namely the RU4 zone. For reasons that I will later explain, I accept that this should be so.

49 Under the provisions of the LEP, a limited range of development is permissible with development consent. Forms of permissible development include dwelling-houses and attached dual occupancies.

50 Clauses 4.1 and 4.2 of the LEP impose minimum lot size controls for the subdivision of land. Subject to exceptions that are not presently relevant, the

minimum lot size for land zoned RU4 is 2ha. Given that the parent land had an area of 2.226ha, no subdivision of that land could lawfully be undertaken.

51 Under the provisions of the Growth Centres SEPP a number of areas within south-western Sydney were identified for future release as land that should be used for urban purposes. The delineation of those areas appeared on precinct plans. The parent land was identified as being within the "Catherine Fields" precinct. Before urban development could be undertaken, lands identified in the precinct were to be rezoned conformably with the Growth Centres SEPP. Selective release of different precincts identified in the State Policy had already occurred. However, there is no evidence to suggest that the "Catherine Fields" precinct was proposed for release at any point in time proximate to the acquisition date. Indeed, the evidence before me suggests that the forecast release time was the "medium to longer term", suggested as being not less than 10 years hence. None of the valuation evidence before me indicates otherwise.

Statutory provisions

52 Division 4 of Pt 3 of the Compensation Act contains those provisions by reference to which the amount of compensation for land acquired under that Act is to be determined. Those provisions to which I am about to refer are found in Div 4.

53 Section 54(1) requires that the amount of compensation to which a person is entitled is that amount which "having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land." Reference to matters relevant under "this Part" identifies an important qualification to the assessment of compensation. Relevantly, it does not permit the determination of compensation to be undertaken having regard to matters that are not identified in Pt 3 of the Compensation Act.

54 Section 55 identifies those matters to which regard is to be had when determining compensation. It is an important provision in the context of the more generally expressed provisions of s 54. Section 55 provides:

> "**55 Relevant matters to be considered in determining amount of compensation**
>
> In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):
>
> (a) the market value of the land on the date of its acquisition,
>
> (b) any special value of the land to the person on the date of its acquisition,
>
> (c) any loss attributable to severance,
>
> (d) any loss attributable to disturbance,

(e) solatium,

(f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired."

55 The immediately succeeding sections of the Compensation Act then define critical phrases used in paragraphs (a) to (e) of s 55. Having regard to the manner in which the case was argued, it is unnecessary to refer to all of those succeeding sections. Clearly, those relevant to claims made do need to be noticed. However, before so doing, it is necessary to record that a component of compensation referable to s 55(f) is accepted by RMS as being payable to the applicants. The rationale for and quantum of that component will be addressed in due course.

56 The market value of the acquired land is, as s 55(a) provides, to be determined at the date of acquisition, relevantly 16 November 2012. The manner of determining that market value is governed by s 56. It provides:

"56 Market value

(1) In this Act:

market value of land at any time means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer, disregarding (for the purpose of determining the amount that would have been paid):

(a) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired, and

(b) any increase in the value of the land caused by the carrying out by the authority of the State, before the land is acquired, of improvements for the public purpose for which the land is to be acquired, and

(c) any increase in the value of the land caused by its use in a manner or for a purpose contrary to law.

(2) When assessing the market value of land for the purpose of paying compensation to a number of former owners of the land, the sum of the market values of each interest in the land must not (except with the approval of the Minister responsible for the authority of the State) exceed the market value of the land at the date of acquisition."

57 Although not referred to in any evidence prepared by or on behalf of the applicants, in the course of questioning Mr Lunney, the valuer retained by RMS, Mrs Rafailidis asked whether special value had been considered by him. That expression as used in s 55(b) is defined in s 57. It is defined in that section to mean:

" ... the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the persons' use of the land."

No evidence was thereafter adduced by or on behalf of the applicants in support of any claim that would fulfil the definition and accordingly no component of compensation by reference to this head can be awarded.

58 Further, I record that annexed to the Class 3 Application commencing these proceedings was the form apparently signed by the applicants by which compensation was initially claimed from RMS in accordance with s 39 of the Compensation Act. In that form the components of compensation sought were identified. Apart from market value, said to be $187,000, the only other two heads of claim identified was a claim for disturbance in the sum of $16,500 together with a claim under s 55(f) for $11,000. Those three figures were totalled to a sum of $214,500 and identified as the "total compensation claimed". No intimation had been given by the applicants that heads of claim, other than those identified in their claim form, would be made.

59 Section 59 of the Compensation Act addresses loss attributable to disturbance. Paragraphs (a) and (b) of that section identify such loss as including both legal costs and valuation fees reasonably incurred in connection with the compulsory acquisition of the land. RMS acknowledged an obligation to pay such reasonable fees but stated that accounts demonstrating that such fees had been incurred were not produced to it by the applicants, notwithstanding requests so to do. A statement of the fees incurred was the subject of a Schedule signed by Mrs Rafailidis on 20 May 2013 for legal and valuation fees totalling $17,467.30. Notwithstanding the assertion by RMS that accounts substantiating these fees had not been produced to it, at the conclusion of the hearing Mr N Eastman, who appeared for RMS, indicated that in the circumstances of this case his client was prepared to concede that these items of disturbance in the amounts claimed should be included in the compensation payable to the applicants.

60 A further claim under s 59 was the subject of a Schedule of losses signed by Mrs Rafailidis on 20 May 2013 and filed in accordance with the Court's usual practice directions. The claim was said to be founded primarily on the provisions of s 59(f) which defines "loss attributable to disturbance" as meaning:

> "(f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition".

The sum sought in Mrs Rafailidis Schedule is $12,800. I will address this component of the claim in due course.

Valuation evidence

61 RMS retained the services of Mr D Lunney, a registered valuer, whose statement of evidence has been tendered in evidence. As the evidence of an expert, the statement was prepared in a manner that conformed with the requirements of Pt 31, Div 2 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) together with the Court's Practice Notes pertaining to expert evidence in Class 3 proceedings of the present kind. As earlier recorded, the applicants did not seek to tender any valuation evidence.

62 However, prior to acquisition of the acquired land, the applicants retained Mr F Carrapetta, a registered valuer, to prepare a valuation report for them. His report is dated 26 October 2012, that is, less than one month prior to acquisition of the acquired land. Mr Carrapetta's report was subsequently provided to RMS. Although detailed, in the sense that it contained information, reasoning and reference to comparable sales such as one might expect in a report or statement of evidence tendered in the course of proceedings of the present kind, it is not a report identified as having been prepared conformably with Pt 31 of the UCPR or the Court's Practice Notes.

63 At the directions hearing before Biscoe J on 11 October 2013, RMS was directed to prepare the Court Book as required by the Court's Practice requirements. That Court Book was to contain a copy of the application commencing the proceedings together with the documentary evidence, including any expert reports. In preparing the Court Book for the present case, RMS has included Mr Carrapetta's report. Legal and valuation fees aside, the conclusion expressed by Mr Carrapetta, if accepted, would result in a sum for compensation exceeding that which Mr Lunney has concluded is the appropriate sum to be determined.

64 On behalf of RMS, Mr Eastman has explained that RMS have taken the course of including Mr Carrapetta's report in the Court Book in deference to the circumstance that the applicants are not legally represented in these proceedings. Although for reasons explained by Mr Lunney, RMS submits that the quantum of compensation for which Mr Carrapetta contends ought not be accepted, it acknowledges that the Carrapetta report presents a contradictor against which the evidence led by RMS may be assessed.

65 As would be obvious, there is some difficulty in assessing Mr Carrapetta's evidence. Apart from the absence of a valuer's joint report addressing the key issues, Mr Carrapetta has not been called to respond to the challenge that Mr Lunney makes to the process of reasoning expressed in the Carrapetta report. Nonetheless, I have admitted the report, essentially for the reasons articulated by Mr Eastman. Given the essential issues between the valuers which I will shortly identify, and given the opportunity which I have had to view both the property of the applicants and the sites identified in the sales transactions upon which the valuers have relied for the purpose of assigning a

value to the acquired land, I am assisted by the report in exercising my role as judicial valuer. In receiving Mr Carrapetta's report I also give effect to the provisions of subss (1) and (2) of s 38 of the *Land and Environment Court Act* which relevantly provides:

> "38 Procedure
>
> (1) Proceedings in Class 1, 2 or 3 of the Court's jurisdiction shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit.
>
> (2) In proceedings in Class 1, 2 or 3 of the Court's jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits."

66 Each of Mr Lunney and Mr Carrapetta have identified the same heads of claim under s 55 of the Compensation Act to which they have assigned an element of compensation. Their disagreement is reflected in the following table:

	D Lunney	F Carrapetta
Market value: s 55(a)	$106,000	$138,250
Decrease in value of residue land: s 55(f)	$20,000	$39,000
	$126,000	$177,250

Both valuers agreed that the applicants were entitled to legal and valuation fees reasonably incurred. Neither valuer sought to quantify those fees. As I have earlier recorded, RMS accepts that those fees total $17,467.30.

67 Neither Mr Lunney nor Mr Carrapetta, in their respective statement and report addressed the schedule of disturbance losses claimed by Mrs Rafailidis in her Schedule filed on 20 May 2013. I will address that claim later in these reasons.

Market value

68 Each valuer adopted the "piecemeal" approach to assign a market value to the acquired land. They each considered sales of property said to be "comparable", deducting their respective assessed value of any improvements on the sale property from the recorded sale price in order to deduce a land value expressed as a rate per square metre. The rate so deduced from each sale was then considered for the purpose of determining a rate per square

metre to be applied to the acquired land.

69 As both valuers agreed in this approach, I accept it as being appropriate in the circumstances of this case. Mr Lunney explained that the piecemeal approach was chosen as the acquired land was less than 10 per cent of the area of the parent land and was devoid of any structural improvements.

70 Mr Lunney analysed ten sales that had occurred between July 2011 and June 2013. Seven of those sales had occurred between February 2012 and October 2012. From all of the analysed sales he had deduced a rate ranging between $34/m² and $47/m². He applied a rate of $50/m² to the acquired land.

71 Mr Carrapetta analysed two sales in order to arrive at his determination of market value. One sale occurred in July 2011 and the other occurred in July 2012. Both were sales that were included among the ten sales analysed by Mr Lunney. From Mr Carrapetta's analysis of the two sales, he derived rates of $37.50/m² and $48/m². He applied a rate of $65/m² to value the acquired land.

72 Nine of the ten sales analysed by Mr Lunney, including one of the two sales also analysed by Mr Carrapetta, was located within the "Catherine Fields" precinct under the Growth Centres SEPP. Each was a property having an area just over 2ha and each had improvements, including a dwelling. Each of them was located in relatively close proximity to the acquired land.

73 The tenth sale relied upon by Mr Lunney related to a property known as 15 Dwyer Road, Leppington (**Sale 10**). This sale was included because it was in close proximity to the parent land and is described as having similar physical characteristics as those that pertain to the parent land, being a corner property with frontage to Camden Valley Way. The sale occurred in July 2011 at which time it was located within the "Catherine Fields North" precinct under the Growth Centres SEPP. According to the evidence given by Mr Lunney, the anticipated time for release of the "Catherine Fields North" precinct under the Growth Centres SEPP did not differ from the anticipated time for release of land within the "Catherine Fields" precinct.

74 While the sites of comparable sales identified by Mr Lunney were, as I have indicated, generally in close proximity to the acquired land, some variation in topography was apparent. The parent land was accepted as being flood free, but part of some of the comparable sale sites were accepted as being within the 1:100 year flood level or below the probable maximum flood level as indicated on a map prepared by Camden Council. Three of the comparable sales identified by Mr Lunney were for properties in Chisholm Road, Catherine Field which at the time of each sale were zoned "R5 - Large Lot Residential" under the LEP. The minimum lot size for land so zoned was 4000m². Thus,

each sale site with an area exceeding 2ha was capable of subdivision at the date of sale. It will be recalled that the minimum lot size that applied to the parent land was 2ha.

75 Notwithstanding these different characteristics of comparable sale sites, based on his overall sales analysis Mr Lunney expressed the following general conclusions:

(i) there was no identifiable change in market price evident in sales between those that took place in 2011 and the most recent sale that occurred in June 2013;

(ii) the market in the "Catherine Fields" precinct was for rural/residential home sites with no apparent premium being paid for one site over another by reason of the anticipation of release for urban development;

(iii) the absence of such a premium reflected in market price appeared to be the consequence of the fact that urban release was not expected to occur for at least a further 10 years;

(iv) as the market focus was upon rural/residential home sites, little, if any, discount seems to have been applied to sites said to be partially flood affected, a conclusion drawn from a comparison of rates per square metre for land that had no flood affectation with the rate per square metre paid for land that was partly so affected; and

(v) a land holding size of approximately 2ha seemed to have been the preferred site area for rural/residential occupation as the Chisholm Road sales did not reflect any premium for their subdivision potential, showing a rate for these three sales in 2012 between \$37/m^2 and \$40/m^2, falling within the same range for sales of properties without subdivision potential.

76 In the absence of any challenge to Mr Lunney's general summary, I accept his evidence in this regard. My observations of each of the comparable sale sites and the locality generally indicated the pattern of development and mode of land use to be consistent with Mr Lunney's description. Where sale sites were identified to me as being partly flood affected, save for the absence of structural improvements in those areas, their appearance and apparent use was undifferentiated from the remainder of the site.

77 In order to address the competing evidence between the valuers as to the market value of the acquired land, it is appropriate to focus upon the two sales that are common to their respective assessments. The property at Sale 10 appears to be the principal focus of Mr Carrapetta's attention.

78 Both valuers agree that Sale 10 is important because of its similarities with the parent land. The former has an area of 2.009ha and, like the parent land, the zoning of the majority of the land under the LEP is RU4 with the frontage adjoining Camden Valley Way zoned SP2. The Sale 10 land rises from the Camden Valley Way frontage providing an elevated home site on which, at the sale date, there was a single storey dwelling with ancillary buildings. From the area of the elevated home site the land then fell towards the rear although not to a level that identified it as being flood prone.

79 In analysing Sale 10, there is little difference between the valuers as to the value they assigned to the improvements on that land. Mr Lunney identified each of the improvements and assigned a value to each of those improvements, the sum of which yielded a total of $160,000. That figure was deducted from the sale price of $1,100,000 resulting in a land value of $940,000 or $47/m² (rounded).

80 For his part, Mr Carrapetta allowed $150,000 as representing the value of the improvements, with no indication of the figures that he had assigned to individual components. Deducting $150,000 from the sale price resulted in a land value of $950,000 or $48/m² (rounded).

81 In applying the deduced land value from Sale 10 to the acquired land, neither valuer contended that the price was required to be adjusted because Sale 10 occurred in July 2011, some 15 months before the applicants' land was acquired by RMS. Although not stated in his report, I infer from the absence of such adjustment that Mr Carrapetta concurred with the opinion of Mr Lunney that sale prices in the area had not reflected any change of significance between 2011 and October 2012 when Mr Carrapetta's report was prepared.

82 It will be recalled that Mr Carrapetta's assessment of market value for the acquired land in the sum of $138,250 was the result of applying a rate of $65/m². By reference to Sale 10 he adjusts the deduced figure of $48/m² to arrive at the higher figure for three reasons. They are:

(i) the sale was an "urgent sale" resulting in the vendor accepting a sum less than the price paid for the land in 2003 and less than what could have been expected at auction in 2011;

(ii) a further rationale for deducing that the sale occurred at an undervalue arose from the circumstance that the land was subsequently included in the "Leppington" precinct under the Growth Centres SEPP which was imminent of release for urban development; and

(iii) the land value deduced from Sale 10 was required to be increased because the applicants' parent parcel was superior land being a corner site having wide frontage to Camden Valley Way.

Mr Lunney does not accept these reasons for adjustment.

83 The assertion by Mr Carrapetta that Sale 10, which occurred on 22 July 2011 reflects an undervalue because it was an "urgent" or "distressed" sale is challenged by Mr Lunney. The date of sale is acknowledged to be 22 July 2011 which was one day prior to the date upon which an advertised auction of the property was scheduled to occur. Whatever may have been the sale price in 2003, Mr Lunney suggests it to be inconceivable that a vendor would accept a price for the property one day prior to the date fixed for auction if there were potential buyers who had indicated an interest in purchasing that property. Mr Carrapetta's statement acknowledges that the property was listed for sale by a real estate agent. Had there been interest in purchasing the property, other than from the successful purchasers, it must be assumed that the selling agent was aware of that interest and would have encouraged the vendor to delay the decision to sell by one day if the potential existed to achieve a higher price at auction. There is substance in Mr Lunney's reasoning and in the absence of any other evidence, I accept it as rational.

84 The second basis upon which Mr Carrapetta asserted that Sale 10 occurred at an undervalue is the claim that the sale property was subsequently included in the "Leppington" precinct which was about to be released for urban development. Documents tendered in evidence as Exhibit 4A address this assertion. They indicate that the Sale 10 land was, at the date of sale, within the "Catherine Fields North" precinct under the Growth Centres SEPP. The precinct immediately adjoining the latter precinct to the north-east was the "Leppington" precinct.

85 The "Leppington" precinct was released for urban development in November 2011. Following that release the Department of Planning and Infrastructure reviewed the south-western boundary of that precinct. Following the review, an amendment to the south-western boundary was recommended to the Minister who endorsed the recommendation on 15 August 2012. The boundary amendment resulted in the Sale 10 land being added to the "Leppington" precinct. As will be apparent, the review did not commence until some four months after the sale date and the decision to amend was not made until 13 months after that date.

86 While Mr Lunney accepts, as he must, the history that I have just recited, his evidence is that at the time at which Sale 10 occurred there was no market knowledge that an adjustment to the precinct boundary would occur. The fact that the boundary review did not commence until after November 2011 and the fact that acceptance of the boundary adjustment did not occur until August 2012 offers support to Mr Lunney's evidence as to the absence of market knowledge in July 2011 of the potential for the precinct boundary to

change.

87 Mr Carrapetta contended in his report that the undervalue of the sale price reflected in the Sale 10 transaction should, for the first two reasons that he has stated, result in an upward adjustment of the deduced land value of $48/m² by 15 to 20 per cent. For the reasons that I have indicated, generally reflected in the evidence of Mr Lunney, I do not accept that any adjustment by reference to the claimed undervalue of Sale 10 should be made.

88 Mr Carrapetta contended for a further adjustment of 15 per cent to the deduced price from Sale 10 because he considered the parent land to be superior "especially given its extra wide frontage to Camden Valley Way and, being a corner site, with possible potential for a neighbourhood shopping centre, nursery business or like." In response to this contention, Mr Lunney notes (and my site inspections establishes) that the Sale 10 property is itself a corner property, having frontage to Camden Valley Way, being located at the intersection of that road with Dwyer Road.

89 The frontage of the Dwyer Road property, including the corner splay, was approximately 50m whereas the frontage of the parent land to Camden Valle Way, including the corner splay, is approximately 75m. If, as Mr Carrapetta contends, the frontage width provides an opportunity for a neighbourhood shopping centre or nursery business, Mr Lunney contends that this circumstance would be contradictory to the contention that the residue land suffers "injurious affection" for which additional compensation should be paid under s 55(f) of the Compensation Act. Mr Lunney opines that the carrying out of road upgrade works and exposure of the residue land to the main road would, if Mr Carrapetta is correct, enhance the value of the residue land rather than diminish its value. Each of the nominated purposes of development for which it is contended the parent land (and, by inference, the residue land) would be more attractive than the Sale 10 land, are presently permissible forms of development with consent in the RU4 zone of the LEP. Yet, I do not infer from Mr Carrapetta's report a contention that the highest and best use of the parent land should be assessed as being for either one of those purposes. His approach to the assessment of market value seems otherwise to be that the value is to be determined on the basis of use as a rural residential homesite.

90 By reason of the apparent inconsistency inherent in the third basis upon which Mr Carrapetta contends for an increase in the deduced land value from Sale 10, I am unable to accept that the deduced land value from that sale should be adjusted upwards by a further 15 per cent when applied to the acquired land.

91 The other sale relied upon by Mr Carrapetta to justify his rate of $65/m² relates to the property known as 72 Catherine Field Road, Catherine Field. The property sold in July 2012 for $1,100,000. This property is also roughly rectangular in shape and has an area of 2.04ha. Approximately 15 per cent of the front portion of the site is flood affected.

92 Erected on the Catherine Field Road property at the date of sale was a dwelling and other improvements. After making allowance for the value of those improvements and deducting that value from the sale price, Mr Carrapetta deduced that the land value for that site was $37.50/m². Undertaking the same exercise, Mr Lunney deduced the land value at $39/m² by assigning a slightly lower value for the improvements than had Mr Carrapetta. Nothing of moment for present purposes turns on this difference.

93 However, in his approach to the deduced value from this sale, Mr Carrapetta sought to reassign land values as between the flood affected land on the sale site and that portion of it that was flood free. He assigned a rate of $10/m² for 6,000m² of the area of the property which, when applied to the sale price and remaining land area, resulted in a land value for the residue of approximately $50/m². He then opined that overall the Catherine Field Road land was inferior to the applicants' land. How the rate of $10/m² for the flood affected land was derived is not disclosed.

94 While I accept, as does Mr Lunney, that overall the site at Catherine Field Road is inferior to the applicants' land, I am unable to accept that it is appropriate to analyse the sale by assigning different rates per square metre to different parts of the sale site. It is Mr Lunney's evidence, which I have accepted, that the market in the area is for rural residential home sites with no apparent differential in price being reflected on account of partial flood affectation. His contention in this regard would appear to be borne out by two sales that he analysed. The property at 324 Catherine Field Road, sold on 22 August 2012 at a deduced land value rate of $40/m². The property had an area of 2.02ha and is said to be flood free. Two months later a nearby property at 268 Deepfields Road sold at a deduced land value of $44/m². This property is said to have an area of 2.09ha and approximately 50 per cent of the rear half of the property is identified as being affected by the probable maximum flood. When the analysed land value of these latter two sales is considered in conjunction with the sale relied upon by Mr Carrapetta of the property at 72 Catherine Field Road in June 2012, there does not appear to be any pattern of discount for 2ha sites, part of which are flood affected.

95 Mr Carrapetta's second sale does not, for the reasons I have expressed, support the contention made by him that the starting point for comparison with the applicants' land is $50/m².

96 As Mr Lunney has demonstrated, the range of land values deduced from 10 sales that he has analysed is from $34/m² to $47/m². The most recent sale that he has analysed is a sale that occurred in June 2013 of property at 126 Deepfields Road which reflects a land value of $42/m². I infer from his evidence that this sale is used in order to discern whether the market was rising at or about the time of the acquisition date in November 2012. Clearly, it provides no evidence of any increasing trend. While that most recent sale was of land that did not have frontage to Camden Valley Way, Mr Lunney states that he is unaware of any market evidence indicating that property as having frontage to Camden Valley Way attracts either a premium or a discount by reason of that frontage.

97 Clearly, the sale representing the highest land value is Sale 10 at Dwyer Road that does have frontage to Camden Valley Way. That fact and for reasons earlier stated, it is closely comparable to the parent land.

98 Notwithstanding that Sale 10 represents the highest deduced value, when applied to the parent land, Mr Lunney is prepared to concede an upward adjustment of 5 per cent resulting in a land value determined at $50/m². This upward adjustment is made on the basis that the Sale 10 land is a narrower and more elongated allotment which, while having an advantage of an elevated building site, falls to the rear which may, in the market, be seen to be slightly less desirable than the more gentle slope of the parent land. As he records, $50/m² is in excess of the deduced rate from all sales that he has analysed and is said to exceed "two recent sales" within the "Leppington" precinct that has been released for urban purposes and intended to be rezoned to achieve that objective "in the short term". The address of the properties relied upon for the purpose of this latter statement have been identified but sales analysis not provided.

99 In all, based on the evidence of Mr Lunney, I find that the market value of the acquired land should be determined at the rate of $50/m². Applying this rate to the area of the acquired land would result in a market value for that land of $106,350. That figure has been "rounded down" by Mr Lunney to $106,000. Although the difference may not seem significant, I do not see any basis for the rounding down that has been applied and as a consequence I propose to adopt the sum of $106,350 as the land value of the acquired land.

100 As will be apparent, and accepting that sum as reflecting the market value of the acquired land, I have done so on the basis that the SP2 zoning applying to almost all of the acquired land was to be disregarded. The RU4 zoning applicable to the parent land and to large areas of land both in the "Catherine Fields" precinct and the adjoining "Catherine Fields North " precinct, coupled with the predominant use of land in those precincts as rural residential holdings, renders it appropriate to assess the market value of the acquired

land as if it was land within the RU4 zone and used for rural residential purposes.

Injurious affection

101 The term "injurious affection" is not a term used in the Compensation Act. Nonetheless, it is used by the valuers to describe the head of consideration identified in s 55(f) of that Act. Relevant to the present case, it requires consideration of any decrease in value of the residue land by reason of the carrying out of the roadworks for which the acquired land was acquired, namely those roadworks earlier described. Impact upon value of the residue land is said to arise in three ways:

(i) the residence and front section of the property will obviously be closer to the carriageway of Camden Valley Way with potential increase in the level of traffic noise experienced in the front section of the residue land, if not in the principal dwelling itself;

(ii) no longer will there be a tree screen shielding the view of the road and its passing traffic from the residue land; and

(iii) upon completion of roadworks travel from the residue land in directions other than those involving "left in/left out" access Deepfields Road will necessitate additional travel distances in order to utilise the omnidirectional access available at the intersection of Camden Valley Way with Catherine Field Road.

102 Both valuers accepted that compensation under s 55(f) was appropriate to be paid. Ultimately, Mr Lunney expressed the opinion that the quantum of compensation for injurious affection should be determined in the sum of $20,000. He stated that he was conservative in so doing, meaning that he was resolving uncertainties in favour of the applicants. His approach was to assess this component of compensation by discounting the value of improvements on the residue land. He determined the value of those improvements, including the two dwellings to which I have referred together with fencing, driveway and "ancillary improvements" to be, $400,000. This sum was discounted to 5 per cent to reflect the diminution in value of the residue land, "having regard to the considerable setback from the two dwellings to the realigned Camden Valley Way." The application of this discount resulted in a compensation figure of $20,000.

103 Mr Carrapetta contended that the compensation to be determined under s 55(f) was the sum of $39,000. Having acknowledged that the determination of this component of compensation was difficult to ascertain with any accuracy, he considered that the diminution in value materially affected about 20 per

cent of the area of the residue land, assuming the affectation applied to a depth of land of about 50m across the realigned frontage to Camden Valley Way. This area he calculates to be about 4,000m². He then applies his deduced land value rate of $65/m² to this area, giving a figure of $260,000 which he discounted to 15 per cent. The result is a compensation figure of $39,000.

104 I agree in the observation of Mr Carrapetta, in the circumstances of this case, that the assessment of diminution in value of the residue land retained by the applicants by reason of the proposed roadworks does not lend itself to precise assessment but rather involves judgment. In my assessment, that judgment is better informed by the approach identified by Mr Carrapetta than that adopted by Mr Lunney. The approach of the former, so it seems to me, is better directed to the decrease in value of the land rather than an approach that seeks to reflect a result by discounting the value of improvements.

105 Applying the methodology of Mr Carrapetta does not result in the figure for which he contends. As I have earlier found, comparable sales that have been analysed do not support a land value at the rate of $65/m². The appropriate rate is $50/m².

106 In my view, it is not unreasonable to accept that something in the order of a 50m depth from the Camden Valley Way frontage of the subject land is considered less valuable than it previously was by reason of the road project that is being implemented. This depth of the residue land does not extend as far as the principal dwelling. I am therefore prepared to adopt the area of 4,000m² in order to calculate a decrease in value of the residue land to which the rate of $50/m² should be applied before discount.

107 Selection of the discount rate is a matter for judgment. The rate of 5 per cent selected by Mr Lunney was described by him as the "maximum discount" that would be suffered given the setback of dwellings from the realigned Camden Valley Way. However, I am not convinced that this discount fully reflects the effect on value arising from the three items of impact that I have identified. The taking away of the significant tree screen, the passing of traffic at the speed indicated and the consequence of limited turn movements at the Deepfields Road intersection suggests to me that a discount rate closer to 15 per cent is appropriate.

108 Having regard to these considerations and acknowledgement that judgment is called for in resolving matters of uncertainty, I propose to apply a discount rate of 15 per cent. Four thousand square metres at a rate of $50/m² yields a figure of $200,000. Discounting that figure to 15 per cent results in compensation under s 59(f) as being assessed at $30,000.

Disturbance under s 59(f) of the Compensation Act

109 As I have earlier indicated, Mrs Rafailidis filed a schedule of disturbance losses under this head on 20 May 2013. The claim identified in that schedule identifies by date what are said to be costs or losses incurred by "attending to the acquisition by RMS and includes hiring of staff in our absence from our private business." The costs itemised in the schedule identify what can only be described as fees that Mrs Rafailidis seeks to recover for attending to administrative matters arising from the acquisition process. By way of example, a fee of $1,000 is charged for meeting with RMS "to discuss, negotiate for settlement". A miscellaneous item for which $3,000 is claimed is referred to as "research, caselaw". Under the general head of administrative costs, an example of the items that appear is an entry on 4 June 2012 in which $500 is claimed, the description of this item being "2 pg letter + revised plans, read, address, telephone, email enquiry".

110 In order to qualify as "loss attributable to disturbance" under s 59(f) of the Compensation Act, the terms of which I have earlier quoted, it is necessary that any such costs relate to "the actual use of the land, as a direct and natural consequence of the acquisition." Claim for a fee for Mrs Rafailidis attending to administrative matters associated with the acquisition do not appear to fall into this category. Such claim would appear to be similar to the "wasted executive time" sought in *Mir Bros Unit Constructions Pty Ltd v Roads and Traffic Authority of NSW* [2005] NSWLEC 467. Such a claim was rejected by McClellan CJ of LEC (as his Honour then was) at [36].

111 In the course of the hearing before me, I understood Mrs Rafailidis to acknowledge that these claims represented a charge for her time in dealing with correspondence and other matters associated with and following upon the acquisition of the acquired land by RMS. Her justification was that if the matter had been referred to a legal advisor, the costs would have been far greater than those which she has charged and as a consequence it was reasonable that she should recover some fee for her time.

112 The claim made in this regard by Mrs Rafailidis does not, for the reasons stated, engage the provisions of s 59(f) of the Compensation Act.

Conclusion as to compensation

113 As I have earlier stated, s 55 of the Compensation Act requires that regard be had only to those heads of compensation identified in paragraphs (a) to (f) of that section. Applying those heads of consideration to the facts and circumstances of the present case, the items and amount of compensation to which the applicants are entitled are, for the reasons already stated,

determined as follows:

Market value s 55 (a)	$106,500.00
Decrease in value of residue land: s 55)(f)	$ 30,000.00
Legal and valuation fees as claimed: s 59(a) + (b)	$ 17,817.30
TOTAL say	$153,817.30 $153,820.00

114 In the result and conformably with the provisions of s 54(1) of the Compensation Act, I determine that the amount of compensation to which the applicants are entitled, having regard to the provisions of Pt 3 of that Act and which will justly compensate them for the acquisition of the acquired land is the sum of $153,820.

ORDERS

115 I make the following orders:

1. Dismiss the applicants' challenge to the validity of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

2. In accordance with the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) determine compensation payable by the respondent for acquisition on 16 November 2012 of Lot 2 in Deposited Plan 1170535 in the sum of $153,820.

3. Exhibits other than Exhibit 1A may be returned.

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Amendments

20 February 2014 - Typo[582] should be 582[123] should be 123
Amended paragraphs: 21

13 February 2014 - change word "stressed" sale to "distressed" sale
Amended paragraphs: 83

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or

decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 20 February 2014